FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK B. KREMENS, ETC., ET AL., APPELLANTS

v.

KEVIN BARTLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether the due process clause of the Fourteenth Amendment requires that procedural safeguards be afforded in the confining of juveniles to state mental health facilities.
2. If so, whether the parents of the juveniles may waive these safeguards on their behalf.
3. If they may not, whether due process is satisfied by the procedures required by the Commonwealth of Pennsylvania before juveniles may be confined to state mental health facilities on the initiative of their parents.

INTEREST OF THE UNITED STATES[1]

The United States has an interest in the protection of both its young and its mentally handicapped citizens, who are the least able to represent themselves and to enforce their constitutional rights. In fiscal year 1976, an appropriation of $269,000 was approved by Congress for litigative efforts by the Department of Justice in these areas (Hearings on State, Justice, Commerce, the Judiciary, and Related Agencies—Fiscal Year 1977, before the Senate Committee on Appropriations, 94th Cong., 2d Sess. 595–596 (1976)).[2]

Large sums of federal money are also expended annually in the area of mental health care under such programs as the Community Mental Health Centers

[1] The United States participated as *amicus curiae* in the district court and filed a brief in support of the appellees.

[2] The United States has participated in various capacities in a number of other cases seeking to protect the constitutional rights of children and mentally handicapped persons. See *O'Connor* v. *Donaldson*, 422 U.S. 563 (letter submitted to the Court); *Morales* v. *Turman*, 535 F. 2d 864 (C.A. 5) (*amicus curiae*); *New York State Association for Retarded Children, Inc.* v. *Carey*, 393 F. Supp. 715 (E.D.N.Y.) (full participation in all aspects of the case, including discovery and argument; hereafter "litigating *amicus curiae*"); *Davis* v. *Watkins*, 384 F. Supp. 1196 (N.D. Ohio) (litigating *amicus curiae*); *Horacek and United States* v. *Exon*, No. CV 72–L–299 (plaintiff-intervenor); *North Carolina Association of Retarded Citizens and United States* v. *North Carolina*, C.A. 3050 (E.D.N.C.) (plaintiff-intervenor); *Halderman and United States* v. *Penhurst*, No. 74–1345 (E.D. Pa.) (plaintiff-intervenor); *United States* v. *Mattson*, decided September 27, 1976, No. 74–138 (D. Mont.), notice of appeal filed October 19, 1976; *Alexander and United States* v. *Hall*, C.A. No. 72–209 (D.S.C.) (plaintiff-intervenor); *United States* v. *Solomon*, decided July 8, 1976, C.A. No. 74–181 (D. Md.), appeal pending, No. 76–2184 (C.A. 4); *Gary W. and United States* v. *Stewart*, C.A. No. 74–2412–C (E.D. La.) (plaintiff-intervenor); *Stockton and United States* v. *Alabama Industrial School*, C.A. No. 2834–N (M.D. Ala.) (plaintiff-intervenor); *Rone and United States* v. *Fireman*, C.A. No. 75–355A (N.D. Ohio) (plaintiff-intervenor); *Jenkins* v. *Cowley*, C.A. No. 3–74–394–C (N.D. Tex.) (litigating *amicus curiae*); *Stamus and United States* v. *Leonhardt and State of Iowa*, C.A. No. 73–126–2 (S.D. Iowa) (plaintiff-intervenor); *Ewing* v. *Gaver*, C.A. No. C–74–147 (N.D. Ohio) (litigating *amicus curiae*); *Evans* v. *Washington*, C.A. No. 76–0293 (D. D.C.) (*amicus curiae*).

Act, 77 Stat. 290, as amended, 42 U.S.C. 2681 *et seq.*; Social Security Act, Sections 1801 *et seq.* (Medicare) and 1901 *et seq.* (Medicaid), as added, 79 Stat. 291, 343, 42 U.S.C. 1395 *et seq.* and 1396 *et seq.* These expenditures reflect the fact that the United States has an interest in the improvement of mental health facilities; it has a correlative interest in ensuring that people who do not require confinement are not committed to facilities from which people requiring inpatient treatment are, therefore, turned away. See S. Rep. No. 294, 90th Cong., 1st Sess. 3 (1967).

STATEMENT

Procedural history

This is a class action brought against state officials[3] in November 1972 on behalf of all persons eighteen years old or younger confined in Pennsylvania mental health facilities under the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P.S.

[3] Appellants are the Director of the Haverford State Hospital, to whom applications for commitment and admission are made; the Secretary of Public Welfare of the Commonwealth of Pennsylvania, who enforces the Act and makes all necessary regulations; and the Deputy Secretary for Mental Health and Mental Retardation, who has general authority to supervise mental health facilities in Pennsylvania.

4402 and 4403. Respondents alleged that the statutes violated the due process and equal protection clauses of the Fourteenth Amendment by permitting commitment upon the application of a parent or guardian and without the procedural rights afforded adults. Each of the named plaintiffs had been committed or admitted to a state mental institution at his parents' request; none of the five wished to remain institutionalized. They sought declaratory and injunctive relief as well as damages.

A three-judge court was convened and, after receiving stipulations of fact and oral expert testimony, the court entered an opinion on July 24, 1975, holding the statutes violated due process. On November 17, 1975, the court entered an order enjoining the further confinement of juveniles committed against their will without a hearing and requiring the implementation of the procedures outlined in the court's opinion pending further action by the state legislature. No damages were awarded. This direct appeal followed.

Facts

At the time this suit was brought, the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P.S. 4101 *et seq.*, provided a comprehensive scheme for mental health services in Pennsylvania. Sections 4402 and 4403 provided, respectively, for the voluntary admission and commitment of persons to mental health facilities. They provided that persons 18 years old and younger could be admitted or committed to a mental health facility upon the application of a parent or guardian and the concurrence of the director of the facility and could be released at the request of that parent or guardian. Adults (defined as anyone more than eighteen years old) may admit themselves and are free to withdraw at any time, in the case of voluntary admission, or within ten days after giving notice, in the case of voluntary commitment. No adult may be involuntarily confined without a court hearing, except in emergency situations.[4]

After plaintiffs filed this suit, the Department of Public Welfare adopted regulations providing certain procedural safeguards for children admitted or committed under Section 4402 or 4403. The regulations provide, *inter alia,* that all juveniles must be referred from a recognized therapist or physician who has psychiatrically evaluated the child; that the director of the institution must conduct an independent examination; and that within 24 hours after admission, every child who is at least thirteen years old must receive written notification explaining that he will be given periodic status reports on his condition, that he may contact his parents, and that he will be provided

[4] Section 4405 permits involuntary emergency detention for no more than 10 days. Section 4406 provides for involuntary commitment upon application to a state court after notice and hearing. Section 4404 permitted commitment upon application of third parties, without a hearing, but that section was held unconstitutional in *Dixon* v. *Attorney General of the Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa) (consent decree). The court found Section 4404 "to be almost completely devoid of the due process of law required by the Fourteenth Amendment." 325 F. Supp. at 972.

with the telephone number of an attorney. If such a child objects to remaining in the institution, the director or the parent must institute an involuntary commitment proceeding or the child must be released.

On July 9, 1976, after this appeal was perfected and probable jurisdiction noted, Pennsylvania enacted the Mental Health Procedures Act.[5] The statute applies to the involuntary treatment of mentally ill, but not mentally retarded, persons,[6] and provides (Section 201):

> Any person 14 years of age or over who believes that he is in need of treatment and substantially understands the nature of voluntary commitment may submit himself to examination and treatment under this act, provided that the decision to do so is made voluntarily. A parent, guardian or person standing *in loco parentis* to a child less than 14 years of age may subject such child to examination and treatment under this act, and in so doing shall be deemed to be acting for the child. * * *

Thus, under the new act, persons who have reached fourteen are treated essentially as adults for purposes of voluntary commitment.[7] Persons under fourteen may still be admitted and withdrawn by their parents

[5] Appellees' Brief, pp. 2–5.

[6] Sections 103, 502.

[7] A minor over thirteen is treated differently in one respect: the director of the facility to whom application for commitment is made must notify such minor's parents or guardian of their right to a hearing within 72 hours by a judge or mental health review officer, "who shall determine whether or not the voluntary treatment is in the best interest of the minor" (Section 204).

or guardians.[8] In January 1977, the new act becomes applicable to persons previously subject to involuntary treatment.[9]

SUMMARY OF ARGUMENT

Commitment to a mental institution involves such substantial interference with the liberty of any person, whether child or adult, that state commitment procedures must provide due process to be consistent with the Fourteenth Amendment. Although persons who voluntarily consent to commitment waive these procedural protections, the potential for conflict between the interests of parent and child is too great to permit the parent to waive the child's personal constitutional right.

To determine the procedures constitutionally necessary to permit commitment of a child to a mental institution, it is necessary to balance the interests involved. All three participants in the process—parent, child, and state—are concerned that those children, and only those, who need institutionalization be confined, and that the procedures by which this is accomplished be as efficient and as non-burdensome as possible. In addition, the child has an independent interest in liberty, and the parent has an independent interest in the unhampered exercise of his responsibility for his child. The risk that the current commitment procedures do not properly balance these inter-

[8] Sections 201, 206(b). In addition "any responsible party" may petition the appropriate state court for the release of a person under fourteen (Section 206(b)).

[9] Section 501.

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ests must be weighed against the probable effectiveness of alternative procedures in serving them. Although we agree with the district court's conclusion that the balance struck in the original Pennsylvania statute did not satisfy due process, we do not believe the record is sufficient to evaluate the constitutionality of the current statute.

ARGUMENT

I. NO PERSON MAY BE INVOLUNTARILY COMMITTED TO A MENTAL HEALTH INSTITUTION WITHOUT DUE PROCESS OF LAW

The Court has held that commitment proceedings, "whether denominated civil or criminal, are subject both to the Equal Protection Clause of the Fourteenth Amendment * * * and to the Due Process Clause." *Specht* v. *Patterson,* 386 U.S. 605, 608 (citation omitted). As Chief Justice Burger wrote in his concurring opinion in *O'Connor* v. *Donaldson,* 422 U.S. 563, 580, persons who are committed to mental institutions are deprived of their liberty:

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. *Specht* v. *Patterson,* 386 U.S. 605, 608 (1967). Cf. *In re Gault,* 387 U.S. 1, 12–13 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding.

In addition, as the district court noted, the effects of commitment may last far beyond the period of

actual confinement, since some stigma is still attached to commitment for mental illness or retardation. See J.S. App. 34a, n. 8. Cf. *In re Ballay,* 482 F. 2d 648, 651–653 (C.A.D.C.).[10]

Children, like adults, enjoy the protections of the Fourteenth Amendment. *In re Gault,* 387 U.S. 1, 13. Although children, because of their dependence on their parents, do not enjoy the same degree of liberty as adults (see *Ginsberg* v. *New York,* 390 U.S. 629, 637–638), it does not follow that the state may provide for their involuntary incarceration without adequate procedural safeguards.[11] As the court of appeals held in *Heryford* v. *Parker,* 396 F. 2d 393, 396 (C.A. 10), a case involving commitment of a mentally deficient juvenile to a state training school,

> like *Gault,* and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies. It matters not whether

[10] Courts of appeals have recognized the damage done to a person mistakenly placed in a mental hospital. See *In re Ballay, supra,* 482 F. 2d at 667; *Matthews* v. *Hardy,* 420 F. 2d 607 (C.A.D.C.); *United States ex rel. Schuster* v. *Herold,* 410 F. 2d 1071, 1078 (C.A. 2).

[11] Sections 4402 and 4403 are entitled "voluntary admission" and "voluntary commitment," respectively. But the procedures provided therein are voluntary only in the sense that they apply when parents or other guardians voluntarily admit or commit their children; no effect is given to the objections of the children being confined. Indeed, four of the five named plaintiffs alleged that they were initially confined against their wishes; none of the five wanted to remain at the time suit was brought, but, under the Pennsylvania statutes, they could not effect their own releases (App. 13a–16a).

> the proceedings be labelled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process.

See also *Saville* v. *Treadway,* 404 F. Supp. 430, 432 (M.D. Tenn.); *J.L.* v. *Parham,* 412 F. Supp. 112, 136 (M.D. Ga.).

Appellants argue that a child has no independent right to challenge the decision of his parents that he should be committed to a mental institution, since, they suggest, that decision is not significantly different from the decision that the child should undergo treatment for a physical ailment (Brief, p. 36).[12] But we believe the differences in the two situations may indeed be significant. The greater long-term loss of freedom, the danger facing a healthy person who is erroneously confined to a mental institution, and the greater stigma attached to hospitalization for mental disorders require greater attendance to procedural safeguards. See *Morrissey* v. *Brewer,* 408 U.S. 471, 481. These considerations, plus the peculiar difficulties of diagnosis and prognosis in the field of mental disorders (including the difficulty in some circumstances of determining which member or members of a family, if any, are in need of treatment), strongly indicate the need for independent review of parents' decisions to confine their children to mental institutions. Cf. *Greenwood* v. *United States,* 350 U.S. 366, 375.

[12] Although we know of no case law suggesting that parents may not obtain treatment for physical ailments of their minor children against the wishes of the children, this Court has held that a state may not enforce a parental *veto* of a minor child's decision to have an abortion. See *Planned Parenthood of Central Missouri* v. *Danforth*, Nos. 74–1151 and 74–1419, decided July 1, 1976.

II. A PARENT MAY NOT WAIVE THE PROCEDURAL PROTECTIONS TO WHICH HIS CHILD IS ENTITLED

In many situations, the law permits parents to make decisions for their children. When there is no substantial likelihood of a conflict of interest between the parent and child, it is reasonable to assume that the parent possesses and the child lacks the maturity and experience that responsible decision-making requires, and that the child's dependency on the parent makes it appropriate to rely on the parent's decisions. For example, in *Wisconsin* v. *Yoder,* 406 U.S. 205, the Court balanced the State's assertion of children's interest in compulsory formal education against the assertion by Amish parents of their interest and the interest of their children in exercising their religion. In that situation, the interest asserted by the parents prevailed. However, the Court in *Yoder* specifically distinguished that case from one involving potentially competing interests between parent and child (406 U.S. at 230, 233–234; footnote omitted:

> This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or

welfare has been demonstrated or may be properly inferred. * * *

* * * * *

To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* [v. *Massachusetts,* 321 U.S. 158] if it appears that parental decisions will jeopardize the health or safety of the

* * * To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* [v. *Massachusetts,* 321 U.S. 158] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

Here, in contrast, the district court concluded that "[i]n deciding to institutionalize their children, parents, as well as guardians ad litem or persons standing in loco parentis, may at times be acting against the interests of their children" (J.S. App. 36a–37a). The record here supports that conclusion. As one psychiatrist testified (testimony of Dr. Eli C. Messinger, App. 616a–617a):

> * * * I believe that there is widespread agreement in the field of psychiatry, as well as the other mental health professions, social work and psychology, that the problems of children and the problems of their parents are inextricably connected; that the family should be viewed in many instances as the locus of pathology or trouble; that it is impossible to understand the symptoms and behavior of any one member of the family without understanding its role in the family in maintaining the family equilibrium; that symptoms are often an expression, be it a distorted expression—a distorted attempt to communicate, make demands on, ask help from, seek the support of other members of the family.

Dr. Messinger also testified that in families that present a child for psychiatric treatment, often the parents or other family members are also in need of psychiatric care (App. 617a).

In these circumstances, the district court properly concluded that "parents may not effectively waive personal constitutional rights of their children" (J.S. App. 37a). Cf. *In re Gault, supra,* 387 U.S. at 55.

III. THE ORIGINAL PENNSYLVANIA STATUTE DID NOT PROVIDE ADEQUATE PROCEDURAL PROTECTIONS

"Once it is determined that due process applies, the question remains what process is due." *Morrissey* v. *Brewer,* 408 U.S. 471, 481. Due process is not a mechanical concept which requires the same procedures in all situations. Rather, it is an adaptable, utilitarian requirement, the contours of which are determined by the particular needs and interests involved in particular situations. *Morrissey* v. *Brewer, supra; Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U.S. 886, 895.[13] This Court last Term summarized the

[13] While not determinative here, the due process standards promulgated in adult commitment and juvenile delinquency cases are instructive in deciding what process is due juveniles confined to mental health facilities, for the deprivation of liberty and the potential consequences are similar.

In the context of commitment of adults to mental health facilities, courts have held that due process requires an opportunity for a hearing on the need for confinement. See *In re Ballay,* 482 F. 2d

required analysis of the particular interests affected in any given case (*Mathews* v. *Eldridge*, 424 U.S. 319, 334–335):

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g.*, *Goldberg* v. *Kelly*, [397 U.S. 254], at 263–271.

The private interests affected here are those of the child and of his parents: both are interested in assuring that a child who needs the treatment he can receive in a mental institution receives that help as promptly as possible, and without unnecessary potentially traumatic procedures. The child has, in addition, a discrete individual interest in not being unnecessarily institutionalized (cf. *In re Gault, supra*), and the parent has a discrete interest in freedom from state interference with his decisions regarding the custody

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648 (C.A.D.C.); *In re Barnard*, 455 F. 2d 1370 (C.A.D.C.); *United States ex rel McGurrin* v. *Shovlin*, 455 F. 2d 1278 (C.A. 3). In juvenile delinquency commitment proceedings, the juvenile is entitled to notice and a hearing with counsel, the right to confront and cross examine witnesses, and to remain silent. *In re Gault, supra.* He is not entitled to a jury. *McKeiver* v. *Pennsylvania*, 403 U.S. 528.

and control of his child (cf. *Wisconsin* v. *Yoder, supra*). These interests do not necessarily conflict with those of the state, namely, that those children, and only those, who require or will benefit from institutionalization are confined, and that the procedures by which this is accomplished are as efficient as possible. None of these interests is insignificant. Accordingly, due process requires that each be accommodated in the procedures adopted.

The second factor here is the risk that the current procedures permit the confinement of juveniles who do not require and will not benefit from institutionalization, and the probable value, if any, of specific additional procedural safeguards in minimizing that risk. Finally, the additional burden of the proposed supplementary procedures on the state's mental health and judicial systems must be considered.

It may well be that analysis of the juvenile commitment process in light of these factors would lead to the conclusion that the minimum constitutionally permissible procedures will vary in different situations. For example, it may be that some categories of infants or young children are so severely mentally defective, or suffer from such a clearly defined serious mental illness, that their suitability for institutionalization is as objectively recognizable and clinically demonstrable as a physical illness. In such cases, the risk of erroneous confinement might be minimal (particularly if appropriate categories were specified by statute or regulation), and due process might not require an independent further review of the medical decisions that are necessary for commitment pursuant to cur-

rent Pennsylvania Department of Public Welfare regulations (see *supra*, p. 5).

At the other extreme, due process may require a hearing equivalent to that provided for adults for the involuntary commitment of a juvenile mature enough to give effective consent to his confinement who does not suffer from a defect so serious as to prevent him from doing so. Cf. *Planned Parenthood* v. *Danforth, supra*, slip op. 21; *In re Gault, supra*, 387 U.S. at 55. In all other cases, it may be that due process requires at least that the child not be committed without an impartial determination (in addition to the certification by the parents' and committing institution's physicians) that such commitment is appropriate and consistent with his best interests.[14] That impartial determination need not be a judicial one.[15] In all cases, however, there would remain the further question of the availability of *habeas corpus*

[14] The need for an independent determination is highlighted by the fact that the statutory standards for commitment and admission are vague. Section 4102 defines "mental disability" as "any mental illness, mental impairment, mental retardation, or mental deficiency, which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care as provided in this act. * * *"

[15] For example, an independent board of psychiatrists or other professionals might conduct an informal inquiry into the need for confinement and the possibility that treatment might be effected through less restrictive alternatives such as out-patient care or family counseling. See, *e.g.*, *Saville* v. *Treadway*, 404 F. Supp. 430, 438–439 (M.D. Tenn.), in which a three-judge court held unconstitutional Tennessee statutory provisions permitting parents to admit juveniles to mental health facilities. The court held that recommendations for admission must be reviewed by an independent board; hearings before the board were to be conducted in an informal manner.

or a similar procedure for later inquiry into the propriety of a continuing confinement. See *supra*, p. 6, n. 8.

It is, we submit, clear that the original Pennsylvania statute under consideration by the district court did not afford due process, since it made no distinctions in commitment procedures on the basis of the nature of the mental defect involved or the age of the juvenile. Instead, all persons less than ninteen years old were subject to confinement against their will, regardless of the nature of their mental defect, on the recommendation of their parent or guardian and the agreement of the director of the institution involved.

The statute enacted on July 9, 1976, does distinguish between the mentally ill and the mentally retarded, and between juveniles younger than fourteen and those who are older.[16] That statute, enacted after the district court's decision, was not considered by that court,[17] and the record here is therefore not adequate

[16] The enactment of the new statute does not moot this case, since commitments of children under age fourteen or for mental retardation are not affected by the new statute. Nor has the case been mooted by the fact that each of the five named plaintiffs is now at least nineteen years old. The case was duly certified as a class action pursuant to Fed. R. Civ. P. 23, the class consisting of all persons eighteen years of age or younger who have been, are, or may be admitted or committed to mental health facilities in Pennsylvania pursuant to the challenged statutes (App. 269a–270a). A controversy still exists between appellants and the present members of the class, and the issue in controversy is capable of repetition yet evading review. See *Board of School Commissioners of the City of Indianapolis* v. *Jacobs*, 420 U.S. 128, 129 (per curiam); *Sosna* v. *Iowa*, 410 U.S. 393, 397–402.

[17] Nor did the court specifically analyze the procedural safeguards contained in the Pennsylvania Department of Public Wel-

to permit this Court to make the detailed analysis necessary to determine whether it affords due process, or, if not, what additional procedures are now necessary. Accordingly, we suggest that the case be remanded to the district court for consideration of whether the subsequently enacted statute meets due process requirements.[18]

CONCLUSION

For the foregoing reasons, the case should be remanded to the district court for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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fare's recent regulations implementing the original act (see J.S. App. 25a, n. 5). Those regulations require the referral of all juveniles to be admitted to a state mental institution by "a recognized medical facility Mental Health/Mental Retardation therapist or Mental Health Agency * * * [or, in the case of mental defectives, by a] pediatrician, or general physician, or psychologist" (Appellants' brief, p. 12).

[18] If the district court concludes after such review that the new act is constitutionally inadequate in particular respects, it would, in our view, be proper for it to adopt affirmative remedial measures on an interim basis, pending the necessary changes in state legislation or regulations to correct the deficiencies. Cf. *Brown* v. *Board of Education*, 349 U.S. 294 (*Brown*).

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